Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Docket ID: EPA-HQ-OAR-2016-0544

Dear Sir or Madam:

As an employee in the fuels industry, I am writing today in response to EPA's proposed denial to move the point of obligation under the Renewable Fuels Standard (RFS).

I am extremely concerned about EPA's proposed denial to move the point of obligation further downstream in the fuel supply chain to rack sellers. This is a serious issue that threatens the viability of merchant refiners, such as HollyFrontier Tulsa Refining LLC in Tulsa, Oklahoma where I am employed. These refineries provide jobs and tremendous economic support to their surrounding communities. The Tulsa Refinery employs 650 people in stable, well-paying jobs, and is one of the most important contributors to our local economy. The current RFS system is punishing merchant refiners by putting us at a competitive disadvantage which is an unintended consequence of the RFS program.

Presently EPA makes refiners and importers of petroleum products responsible for certifying blending of biofuels and petroleum products regardless of their ability to physically blend, or influence blending of their finished products. The disconnect that exists by obligating refiners without consideration of their ability to blend renewable fuels is the primary flaw within the RFS program. Merchant refineries like ours in Tulsa own limited downstream infrastructure, and no retail stations. Because of this logistical reality, my company must acquire Renewable Identification Numbers (RINs) on the open market to satisfy our annual required blending requirement by EPA.

In 2016 HollyFrontier's refineries, including Tulsa, spent approximately $250 million on RIN purchases. This cost represents a greater amount than was spent on total payroll for more than 2,700 for employees like me. Simply put, these dollars do nothing to advance the goals of the RFS program, enable greater investment in our facilities, or increase wages and take home pay.

I request that the EPA act to move the Point of Obligation from refiners and importers to rack sellers which will better align ability to comply with the annual volumes mandated by EPA, and greatly reduce RIN market volatility.

Thank you for your consideration in this manner.

Sincerely, (b) (6)

THE HOLLYFRONTIER COMPANIES

2828 North Harwood
Suite 1300
Dallas, Texas 75201

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FEB 27 2017

US Environmental Protection Agency
Office of the Administrator
1200 Pennsylvania Avenue, NW
Washington, DC 20460

FCL 20361880

20460-

Mon Feb 27 17:03:20 EST 2017
Pruitt.Scott@epamail.epa.gov
Fw: AWWA Letter re FY '18 Budget
To: CMS.OEX@epamail.epa.gov

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For the Daily Reading File

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**From:** Tracy Mehan <tmehan@awwa.org>
**Sent:** Monday, February 27, 2017 4:50 PM
**To:** ombdirector@omb.eop.gov; Pruitt, Scott
**Subject:** AWWA Letter re FY '18 Budget

Dear Director Mulvaney and Administrator Pruitt,

Please see the attached letter from the American Water Works Association (AWWA) relative to the FY 2018 budget, specifically as it pertains to water infrastructure and related matters.

Thank you for your interest.

Sincerely,

G. Tracy Mehan, III
Executive Director, Government Affairs
American Water Works Association
1300 Eye Street, N.W., Suite 701W
Washington, D.C. 20005-3314
202-326-6125 (direct)
(b) (6) (cell)
tmehan@awwa.org

Attachment

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American Water Works Association

*Dedicated to the World's Most Important Resource™*

Government Affairs Office
1300 Eye Street NW
Suite 701W
Washington, DC 20005-3314
T 202.628.8303
F 202.628.2846

February 27, 2017

The Honorable Mick Mulvaney, Director
Office of Management and Budget
Eisenhower Executive Office Building
1650 Pennsylvania Avenue, NW
Room 252
Washington, DC 20503

The Honorable Scott Pruitt, Administrator
Environmental Protection Agency
William Jefferson Clinton Federal Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Director Mulvaney and Administrator Pruitt:

On behalf of the 50,000 members of the American Water Works Association (AWWA), including over 4,000 utility members, I am writing you to urge your support for federal investment in our nation's drinking water infrastructure. Water infrastructure is vital to our nation's well-being. It protects public health and the environment, supports local and national economies, protects us from fires, creates jobs and brings us a higher quality of life. As the process of creating the federal budget for Fiscal Year 2018 begins, AWWA urges you to take the following actions:

- Fund the Water Infrastructure Finance and Innovation Act (WIFIA) at $45 million, the level authorized in the Water Resources Reform and Development Act of 2014 (P.L. 113-121);
- Fund the Drinking Water State Revolving Fund (DWSRF) at $1.8 billion.
- Maintain funding at the levels found in the Further Continuing and Security Assistance Appropriations Act of 2017 (P.L. 114-254) for research that assists the Environmental Protection Agency (EPA) in preparing sound regulations related to drinking water; and
- Maintain funding at levels found in the Further Continuing and Security Assistance Appropriations Act of 2017 (P.L. 114-254) for EPA's and Office of Ground Water and Drinking Water (OGWDW) within the Office of Water (OW) to support development of sound regulations related to drinking water.

WIFIA and the DWSRF, in combination, can help communities of all sizes rebuild and repair their drinking water infrastructure. WIFIA allows the federal government to play an important role in facilitating increased local spending on infrastructure by lowering the cost of capital for water infrastructure projects. Based on estimates from the Senate Environment and Public Works Committee, Congressional appropriations could be leveraged at a ratio of 67:1. **For example, if WIFIA were to receive the $45 million authorized for FY 2018 under WRRDA 2014, the program**

**could cover $3.015 billion in credit assistance.** These attributes make WIFIA an ideal vehicle for meeting President Trump's goal to invest in the nation's water infrastructure.

Both WIFIA and the DWSRF help communities in the effort to meet the more than $1.3 trillion price tag for needed water infrastructure investments. Not only does investing in water infrastructure protect public health, it charges local economies and creates jobs in our communities. The US Department of Commerce Bureau of Economic Analysis (BEA) estimates that for every dollar spent on water infrastructure, about $2.62 is generated in the private economy. And for every job added in the water workforce, the BEA estimates 3.68 jobs are added to the national economy.

Meanwhile, the DWSRF program is a shining example of partnership between the federal government and the states. Since 1997, federal investment of over $19.1 billion has been matched with more than $32.5 billion from the states to provide more than 12,800 assistance agreements to help water systems improve and modernize their systems.

As you know, the work that EPA does to protect public health in regards to drinking water is based in sound research and science. Ensuring that funding to continue this important research, at minimum at the current funding levels found in the continuing resolution passed late last year, will help EPA make informed regulatory determinations on issues with our nation's drinking water. For example, in October of last year the Water Research Foundation (WRF) published "Lead and Copper Corrosion: An Overview of WRF Research," which provided summaries and background on the 41 published and six ongoing research projects that the Foundation has undertaken since 1990. Congress created the National Priorities Water Research grant program to ensure that EPA sponsors extramural research on sensible topics such as lead contamination. Providing federal funding for this national program and other water-related research will help EPA make determinations that benefit public health and drinking water utilities.

Finally, providing funding for OW and OGWDW to help the agency develop and implement, sound regulatory actions with adequate stakeholder engagement is fundamental to the work of EPA, the state primacy agencies, and stakeholders throughout the water sector. Under the Safe Drinking Water Act (SDWA), there has been a history of collaborative rulemakings that have handled difficult risk management challenges. Going forward, the existing Six-Year Review process has brought up several tough issues that will require a concerted effort to engage stakeholders at multiple levels and jurisdictions. A commitment from this administration to ensure that the funding necessary to tackle these challenges is available will safeguard the drinking water regulatory process and certify the involvement of all essential parties.

AWWA would be happy to discuss the WIFIA program, DWSRF, or other drinking water issues with you further. Please feel free to call me or Sean Garcia on my staff (202-326-6122) if you have any questions or need further information.

Yours Sincerely,

G. Tracy Mehan, III
Executive Director of Government Relations
American Water Works Association

Mon Feb 27 17:06:49 EST 2017
Pruitt.Scott@epamail.epa.gov
Fw: Request for Agency Agreement to Mediation/Settlement Discussions in City of Taunton v. EPA (1st Cir. 16-2280)
To: CMS.OEX@epamail.epa.gov

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**From:** John Hall <jhall@hall-associates.com>
**Sent:** Wednesday, February 22, 2017 11:37 AM
**To:** Pruitt, Scott; Benton, Donald; Schnare, David
**Cc:** Buckley, Sarah (ENRD); Kaplan, David (ENRD); thoye@taunton-ma.gov; Daniel de Abreu
**Subject:** Request for Agency Agreement to Mediation/Settlement Discussions in City of Taunton v. EPA (1st Cir. 16-2280)

Dear Administrator Pruitt:

Congratulations on your confirmation as the new Trump Administration head of EPA. Your arrival could not have come at a more opportune time for the City of Taunton, Massachusetts.

The City of Taunton is requesting that their permit challenge pending before the 1st Circuit be put in abeyance, to allow settlement discussion of the issues with your staff to occur. As noted in the attached correspondence from the Taunton Estuary Municipal Coalition, EPA's permitting action grossly conflicted with the accepted, peer reviewed scientific methods for evaluating nutrient effects and failed to follow the "rule of law". In particular, the extreme nitrogen reduction mandate and other limits imposed on this economically depressed city were a result of an environmental agenda to regulate more restrictively, regardless of the facts.

We are confident that a frank discussion of the events that transpired and a fair review of the science and regulatory requirements applicable to such cases, would result in an agreement that this permit action needs to be withdrawn and reconsidered. If your Office would inform the Justice Department and the City that the Agency is agreeable to putting the matter in abeyance, pending settlement discussions(e.g., alternative dispute resolution), the appropriate motion could be filed with the 1st Circuit. Such action would allow he City's limited resources to be directed at a productive resolution of the matter.

The City of Taunton looks forward to your Office's response. Thank you for your consideration of this request.

**John**

John C. Hall
Hall & Associates
1620 I Street, NW, Suite 701
Washington, DC 20006
Phone: 202-463-1166
Fax: 202-463-4207
E-Mail: jhall@hall-associates.com

# Taunton Estuary Municipal Coalition

*February 9, 2017*

***Via Email and First Class US Mail***

Scott Pruitt
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

**RE: Request for Peer Review of EPA Region 1's Unprecedented Use of the Sentinel Method to Impose Stringent Nitrogen Limitations**

Dear Administrator Pruitt:

On behalf of the major cities discharging to the Taunton Estuary (Taunton and Fall River) and New Bedford, I am submitting this letter requesting your intervention and review of a series of unprecedented and scientifically indefensible regulatory decisions made by EPA Region 1 an attempt to impose extremely stringent nitrogen limitations on our facilities. These NPDES permit actions represent quintessential examples of decision making based on EPA policy rather than sound science and environmental need. If left in place, these new mandates will impose well over $100 million in new wastewater and stormwater compliance costs for our cities. Given the new administration's desire to eliminate wasteful regulation, we are hoping to obtain your assistance in staying further permit appeal proceedings and objectively reviewing the scientific concerns we had raised previously, which were all disregarded by the prior administration. The following provides some brief background on the matter.

In 2015, EPA finalized a permit imposing "state of the art" nitrogen limitations on Taunton's wastewater treatment facility after a protracted dispute regarding the need for such limitations. EPA issued a similar permit for Brockton in January, 2017, and intends similar mandates for New Bedford and Fall River, but due to ongoing appeals has not finalized those actions. EPA Region I imposed the stringent nutrient limitations even though:

1. The Taunton Estuary is not identified as nutrient impaired;

2. Three nationally recognized experts (including Dr. Steven Chapra, Tufts University of international renown) stated that EPA's novel calculation procedure (known as the "Sentinel Method") was not scientifically defensible and would clearly give an erroneous result;

3. System data, collected by Dr. Brian Howes in 2004-2006, confirmed that the stringent nitrogen limitations would not materially improve dissolved oxygen levels (the stated concern of EPA's nutrient reduction mandate), and;

4. EPA's analysis ignored all of the other system improvements occurring since 2004 that EPA itself had mandated to improve water quality in the system (including the closure of major power plants, reduction of combined sewer overflows and nutrient discharges by major Rhode Island facilities).

Individually, each of these errors should have warranted a remand of the permit. Even EPA Headquarters had confirmed, under FOIA, that the Region's novel procedure for claiming stringent nutrient limits were required was never peer reviewed or determined by anyone to be scientifically defensible. (Attachment 1) Nonetheless, EPA Headquarters refused a request from the *Center for Regulatory Reasonableness* to peer review the new method (in derogation of the federal Peer Review Handbook). (Attachment 2) EPA's Environmental Appeal Board (EAB) rejected all technical arguments and actively prevented consideration of the reports from independent experts confirming the Region's approach was technically baseless (See, Attachment 3, Letter of Dr. Brian Howes, Dartmouth- SMAST, who confirmed EPA was misapplying his data in reaching its conclusions). Left with little other choice, the City of Taunton appealed the EAB's decision to the First Circuit Court of Appeal (*see City of Taunton v. EPA*, (1st Cir. 16-2280)) and filed a permit modification request with EPA Region 1 to properly consider the information the EAB refused to assess in supporting EPA's permit action. Those actions are presently pending.

**Requested Action**

The cities believe that all permitting and appeal actions should be stayed, pending a complete scientific review of the Region's actions. An independent peer review of EPA's untested "Sentinel Method" should occur, as required by the federal Peer Review Policy, given the enormous local resources at stake. It is our belief that no group of credible scientists would possibly find this approach to be "scientifically defensible" which is why the prior administration refused to allow such review. In any event, should such review determine the Region's actions are, in fact, scientifically defensible and accurately reflect the impact of nitrogen on the DO regime of the Taunton Estuary, we would be willing to live with that result, knowing our monies will be well spent.

Thank you for your consideration of this request.

Sincerely,

Thomas C. Hoye Jr

Mayor

Enclosures

cc. David Schnare, USEPA
Don Benton, USEPA
Mayor Correia, Fall River
Mayor Mitchell, New Bedford

Mon Feb 27 17:13:01 EST 2017
Pruitt.Scott@epamail.epa.gov
Fw: The Meadow's Business Park AJD - 601 days and counting!
To: CMS.OEX@epamail.epa.gov

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**From:** (b) (6)
**Sent:** Tuesday, February 21, 2017 5:39 PM
**To:** Pruitt, Scott
**Subject:** The Meadow's Business Park AJD - 601 days and coun ing!

Secretary Pruitt,

Congratulations on your appointment. By my first had account, dealing with the Corps of Engineers & EPA. It looks like you will have your plate full!
I've had a request in to the St. Paul Army Corps of Engineers for a simple AJD for 601 days, with no response.

Please read the attached letter and information. I think this is exactly why President Trump, put you in charge of this agency.

We all know its broken. But as my father always said, It takes a good man to "fix it"!

Please have some one contact me.

Pete Thorson
Meadow's Business Park

**President Donald J. Trump**
Feb. 18. 2017

1600 Pennsylvania Ave. Washington D.C. 20460

**House Speaker Paul Ryan**

20 South Main St. Janesville, WI. 53545

**Sec. of EPA Scott Pruitt**

1200 Pennsylvania Ave. N.W. Washington D.C. 20460-1101A

# Why we need Regulatory Reform – 600 days and counting!

Dear President Trump, Speaker Ryan & Secretary Pruitt,

On Sunday Feb. 19, 2017, "The Meadow's Business Park" a City of Tomah,Wisconsin sponsored 64ac. business development. Will have waited **600 days** now, for an AJD (Approved Jurisdiction Decision) from the Army Corps of Engineers (ACOE) and the EPA. This ordinary request is suppose to be routinely responded to by the ACOE & EPA in their 60 day processing timeframe.

Their procrastination, unsubstantiated data and clear obstruction from laws. Is particularly troubling when regulatory staff have personal agenda's, contrary to the record. This now affects parties like City of Tomah, Kevin Pierce (Hawkes Company) and myself without merit or standing. The City has lost at least three (3) shovel ready business in the past 2yrs. and has 10 million dollars of prospects on the line today. Not to mention to the Jobs, secondary incomes and growth the business park will create. Currently Monroe County has 75 million dollars of new potential Tax base, Jobs and Growth waiting response's from the St. Paul Army Corps of Engineers offices.

## Meadows Business Park

Of the 64 ac. only 2-3 ac. are isolated wetlands, and the plans are to avoid these areas. With exception of road crossings, which are generally permitted. This is a state issue, not a federal jurisdictional wetland (46 miles from traditional navigable waters) (TNW) the Wisconsin River.

United States Supreme Court vacated this position and site in (U.S. v. Gerke) 2006, along with (Rapanos v. U.S.) 547 U.S. 715 (2006) The personal agenda's of the St. Paul (ACOE) personal, fail to acknowledge case laws like SWANCC, Rapanos, Great Norwest or Hawkes too mention a few. Instead they create their own positions, falsify data of on site visits and extending the unattainable.

Five (5) very qualified Environmental consultants (Sanders, Straw, Bopray, Kagel & Newling) have been to the site, multiple times over the years. And strongly disagree with the St. Paul (ACOE) positions and preliminary conclusions. Dr. Sanders and Mr. Newling are former (ACOE) officials and authors of the Corps "87"delineation manual. Otherwise referred to as the "Wetland Manual" So the gentlemen who wrote the book, disagree with the agents enforcing today's implications.

## Hawkes Co.

The United States Supreme Court ruled unanimously 8-0 in favor of Hawkes Co. in May of 2016 (U.S. Army Corps of Eng. v. Hawkes) 2015 – 290 This finally allow's property owners nationwide the right to appeal a AJD from the Corps. Something unattainable for the last 30yrs.

**Note - Justice Kennedy's comments in Hawkes:** 1) "the act's ominous reach, would again be unchecked" 2) "agency's unfettered discretion" 3) "continues to raise troubling questions regarding the governments power to cast doubt on the full enjoyment of private property throughout the nation"

On **1-24-2017** a Minnesota District Judge vindicated Kevin Pierce of Hawkes Co. with a decision favoring Hawkes and property owners like us. Ruling the St. Paul Army Corps of Engineers failed to prove a surface water connect or significant nexus test. Required by (Rapanos v. U.S.) 547 U.S. 715, 778-82 (2006) (Kennedy,J. concurring) Like Hawkes.. the corps always has site data to collect, But never show up to complete or verify!

**Note – Judge Montgomery's comments:** "the corps transparently obvious litigation strategy" – leave's plaintiffs without an adequate remedy until the corps….achieve[s} the result its local officers desire, without establishing CWA jurisdiction.

Or **Justice Alito's comments:** "the uncertain reach of the Clean Water Act…. Leaves most property owners with little practical alternatives but to dance to the EPA's {or to the Corps} tune" Id. at 1002 (quoting Sackett v. EPA, 132S. Ct.1367,1375 (2012) Aloto, J., concurring)

Pretty said that we live in a nation, where a law confirmed in 2006 (Rapanos) Is still not implicated by the agencies [EPA / ACOE] 10yrs. later in 2017. The same agency's that were scolded repeatedly, by Justice's in (Sackett, Koontz, Great Northwest and now Hawkes) **and today it is still business as usually … Pre - "2006"**

The City, our consultants, U.S. Representives and myself, have communicated relentlessly by Phone, U.S. mail, E-mails, site visits, meetings and 2 personal visits to the St. Paul District office's to meet with corps officials and Col. Calkins. With the same results **"We're working on the file"**

On Feb. 3, 2017 we (Pete Thorson, Kelly Bopray & Kevin Pierce) met with Major General Wehr of the Mississippi Valley Division in Vicksburg, overseeing the corrupt St. Paul District. Our presentation of the irregular practices, unsubstantiated and falsified data should have been overwhelming. Kevin Pierce testimony of his experiences in the (Hawkes case) 13-cv-00107-ADM-TNL doc 85 1/24/17 was riveting. When his vindication can be easily confirmed, by the Judge Montgomery's decision and comments (see pg. 26 of the decision).

**Now 2 weeks later….** No response yet from M.G. Wehr, or his staff. Col. Calkin's replied, It's submitted and forthcoming. The same response we have heard for the past year!

All we expect is the fair and equitable use of our private properties. Like others have been afforded, and where communities can enjoyed the economic impacts thereafter. Then assurance's that property owner's that follow us, are not exploited like Pierces and our families have had to endure over these troubling years.

## Can you assist us?

Pete Thorson

25822 Highland Ave.

Tomah, WI. 54660

c-(b) (6) e-mail – constructionmgm@centurytel.net

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**

Hawkes Co., Inc., Pierce Investment Co., and LPF Properties, LLC,

Plaintiffs,

v.

United States Army Corps of Engineers,

Defendant.

**MEMORANDUM OPINION AND ORDER**
Civil No. 13-107 ADM/TNL

Gregory R. Merz, Esq., and Nancy Quattlebaum Burke, Esq., Gray Plant Mooty Mooty Bennett, PA, Minneapolis, MN, on behalf of Plaintiffs.

Daniel R. Dertke, Esq., United States Department of Justice, Washington, D.C., Friedrich A.P. Siekert, Esq., United States Attorney's Office, Minneapolis, MN, and Molly McKegney Hunt, Esq., United States Army Corps of Engineers, St. Paul, MN, on behalf of Defendant.

## I. INTRODUCTION

On October 28, 2016, the undersigned United States District Judge heard oral argument on Plaintiffs Hawkes Co., Inc. ("Hawkes"), Pierce Investment Co. ("Pierce Investment"), and LPF Properties, LLC's ("LPF") Motion for Summary Judgment [Docket No. 49] and Defendant United States Army Corps of Engineers' (the "Corps") Cross Motion for Summary Judgment [Docket No. 79]. For the reasons set forth below, Plaintiffs' Motion is granted and the Corps' Cross Motion is denied.

## II. BACKGROUND

This case arises from a determination made by the Corps that it has jurisdiction, under the Clean Water Act, 33 U.S.C. § 1251 et seq. ("CWA"), over 150 acres of wetlands located more than 90 river miles and 40 aerial miles from the nearest navigable water, the Red River of the North ("Red River"). Plaintiffs seek judicial review pursuant to the Administrative Procedures

Act, 5 U.S.C. §702 et seq. ("APA"), of this jurisdictional determination. Plaintiffs argue that the determination must be reversed as arbitrary, capricious, and contrary to law because the administrative record lacks sufficient evidence to support the exercise of CWA jurisdiction over the specific wetlands at issue.

**A. Proposed Expansion of Peat Mining Operations**

Plaintiff Hawkes is a peat mining company that plans to mine peat from 150 acres of wetlands (the "Wetlands") located on a 530-acre parcel of land owned by affiliated corporations Pierce Investment and LPF, also Plaintiffs. Administrative Record ("AR") [Docket No. 65] 87.[1] The Wetlands are located in Marshall County, Minnesota and contain high quality peat that Hawkes seeks to mine for use in the construction of golf greens. Id. Hawkes is already mining peat from nearby land. Expanding operations to include the 150 additional acres would extend the life of Hawkes' mining operations for approximately 16 more years. AR 88.

**B. Clean Water Act and Significant Nexus Test for Jurisdiction**

Hawkes' expanded peat mining project would involve the filling or discharge of materials onto the Wetlands. The CWA prohibits the discharge of materials into "navigable waters," which are broadly defined as "waters of the United States." 33 U.S.C. §§1251(a), 1311(a), 1362(6). The Corps has authority under the CWA to issue permits for the discharge of dredged or fill materials into navigable waters, including wetlands. See 33 U.S.C. §1344. The Corps determines whether particular property qualifies as "waters of the United States" (and is thus subject to its permitting jurisdiction under the CWA) by issuing a document called an

[1] Hawkes, Pierce Investment, and LPF are all closely held corporations owned by members of the Pierce family. Kevin Pierce is an officer in each of the companies. Am. Compl. [Docket No. 7] ¶9.

Approved Jurisdictional Determination or JD. 33 C.F.R. 320.1(b), 325.9, 331.2.

To determine whether the wetlands at issue are waters of the United States under the CWA, the Corps has applied the significant nexus test established by Justice Kennedy in his concurring opinion in Rapanos v. United States, 547 U.S. 715, 778 82 (2006) (Kennedy, J., concurring).[2] Under this standard, the Corps has jurisdiction over the wetlands in question if a significant nexus exists between the wetlands and navigable waters in the traditional sense. Id. at 779. The required nexus must be assessed in terms of the [CWA s] goals and purposes, which are to restore and maintain the chemical, physical, and biological integrity of the Nation s waters. Id. (quoting 33 U.S.C. 1251(a)). The rationale for regulating wetlands under the CWA is that wetlands can perform critical functions related to the integrity of other waters functions such as pollutant trapping, flood control, and runoff storage. Id. at 779 80 (citing 33 C.F.R. 320.4(b)(2)). Accordingly, wetlands satisfy the significant nexus test if:

> the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable. When, in contrast, wetlands effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term navigable waters.

Id. at 780. The test is met if the wetlands in question significantly affect any one of the three

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[2] The four-justice plurality opinion in Rapanos was authored by Justice Scalia, who articulated an alternative test for establishing CWA jurisdiction over wetlands. Rapanos, 547 U.S. at 742. The plurality opinion limits jurisdiction to those wetlands with a continuous surface connection to bodies that are waters of the United States in their own right, so that there is no clear demarcation between waters and wetlands. Id. The Eighth Circuit has held that wetlands are subject to CWA jurisdiction if they satisfy either of the two tests articulated in Rapanos. United States v. Bailey, 571 F.3d 791, 799 (8th Cir. 2009). The Corps does not assert jurisdiction under Justice Scalia s continuous surface connection test, so it is not analyzed here.

attributes physical, biological, or chemical.

Conversely, a wetland will not satisfy the significant nexus test if its effect on water quality is speculative or insubstantial. Bailey, 571 F.3d at 798 (citing Rapanos, 547 U.S. at 780). Justice Kennedy created the significant nexus test specifically because he was disturbed by the assertion of jurisdiction over wetlands situated along a ditch many miles from any navigable-in-fact water, carrying only insubstantial flow toward it. Precon Dev. Corp., Inc. v. U.S. Army Corps of Engrs, 633 F.3d 278, 295 (4th Cir. 2011) (quoting Rapanos, 547 U.S. at 786 (Kennedy, J., concurring)).

When, as here, the Corps seeks to regulate wetlands based on adjacency to a non-navigable tributary, it must establish a significant nexus on a case-by-case basis. Rapanos, 547 U.S. at 782 . Given the potential overbreadth of the Corps regulations, this showing is necessary to avoid unreasonable applications of the statute. Id. Although the significant nexus test does not require laboratory tests or any particular quantitative measurements in order to establish significance, the Corps must present some evidence of both a nexus and its significance. Precon, 633 F.3d at 294. Otherwise, it would be impossible to engage meaningfully in an examination of whether a wetland ha[s] significant effects or merely speculative or insubstantial effects on navigable waters. Id. Moreover, the use of conditional language to assess the significance of the tributaries to which the wetlands are connected could suggest an undue degree of speculation, and a reviewing court must identify substantial evidence supporting the Corps claims of jurisdiction. Rapanos, 547 U.S. at 786.

**C. Initial Jurisdictional Determination**

In December 2010, Hawkes applied to the Corps for a permit to begin mining peat from the Wetlands. AR 80. On February 7, 2012, the Corps St. Paul District ( District ) issued an Approved Jurisdictional Determination (the Initial JD ) in which it concluded that the Corps has jurisdiction over the Wetlands based upon a significant nexus between the Wetlands and the Red River, the nearest traditional navigable water. See generally AR 421 42. The Red River is located at least 93 river miles and 42 aerial miles from the Wetlands. See AR 120.[3]

The Initial JD determined that the Wetlands are part of a contiguous 591-acre wetland complex (the Wetland Complex ) that flows through a man-made ditch, then into an unnamed seasonal tributary, then to the Middle River, and ultimately to the Red River. AR 427, 430. More specifically, water from the 151-acre Wetlands flows south under a county road via two 24" culverts, and onto neighboring wetlands located on the other side of the road. AR 430, 439. The water then continues to flow south through the neighboring wetlands until it reaches a 448-linear foot wetland drainage feature that directs the water east. AR 430, 440. The drainage feature connects with a 512-linear foot man-made ditch that cuts through an upland pasture or hayfield of a neighboring farm. Id. The 512-foot upland ditch does not have a continuous ordinary high water mark.[4] AR 430. Water travels through the upland ditch and is discharged into an unnamed seasonal tributary. Id. The seasonal tributary then flows approximately 1,500

[3] Plaintiffs contend the Red River is over 120 river miles and over 50 aerial miles and from the Wetlands. AR 473, 478. For purposes of this decision, the more conservative mileage figure from the Administrative Record will be used.

[4] Notes from a December 2011 site visit by Corps employees states that [a]n approximately 12" wide band of the vegetation in the ditch bottom is flattened; however, the ditch appears to be used by wildlife as a travel corridor so it is unclear if the flattened vegetation is primarily a result of water flow or wildlife use. AR 250.

feet southeast before merging with another stream and entering the Middle River, which flows into the Red River. AR 427, 430, 436.

The Initial JD acknowledged that water flow in the seasonal tributary connecting Wetlands to the Red River had not been observed during the Corps' field investigations. See AR 436 ("Flow in the unnamed tributary has not been quantitatively assessed and the only direct observations of the [tributary] were made in December of 2011 at which time there was standing water in pools but no continuous flow."); AR at 428 ("Surface flows were not observed in the tributary by the Corps staff."). Nevertheless, the Initial JD stated that "[a]lthough not verified, surface flows [in the tributary] are believed to occur in response to snowmelt and precipitation and would most likely be present between March and June and after significant precipitation events in other portions of the growing season." AR 429.

To evaluate this potential flow, the Corps utilized its seasonal stream evaluation protocol, which uses drainage area measurements to predict whether a tributary will have seasonal flow (i.e., continuous flow for at least three months). AR 427. The tributary's drainage area was more than double the threshold size that typically satisfies the Corps' definition of seasonal flow. Id. Thus, the Initial JD found it "reasonable to conclude" that the tributary has seasonal flow. Id.; see also AR 436 n.3 ("The Corps has not quantitatively assessed the flow regime of the tributary but, based on the size of the drainage area, observed flow through the wetlands in June [2011], and direct observations of what are believed to be groundwater supported pools in the stream channel, has preliminarily established that the stream has an intermittent flow regime.").

The Initial JD also speculated that groundwater may contribute to the tributary's flow based on the existence of the pools in the midst of a severe drought, but stated that "additional

site investigations would be required to confirm this contribution," AR 427, and that the groundwater contribution "ha[d] not been confirmed." AR 428. Additionally, the water quality of the tributary was not formally assessed but was "expected to be good based on adjacent land uses, amount of wetlands in the area, and buffers around the tributary." Id.

The Initial JD also discussed functions that are generally performed by wetlands, such as reducing downstream flooding by providing floodwater storage, and reducing downstream pollution by retaining excess nutrients and sediments. AR 438. The general functions of streams and tributaries were also discussed, including their role in transporting nutrients and chemicals to downstream waters. Id.

The Initial JD also described characteristics of the Red River, including its history of frequent flooding, and its listed status with the Minnesota Pollution Control Agency as impaired for aquatic life and aquatic consumption due to turbidity, as well as mercury and PCB in fish tissue. AR 437. The Initial JD concluded that "[t]he functions of the wetlands . . . combined with the functions provided by the tributary results in a significant nexus to the Red River." AR 434.

**D. Administrative Appeal**

On April 4, 2012, Plaintiffs administratively appealed the Initial JD to the designated Corps Review Officer. AR 471–518. Plaintiffs argued, among other things, that the Corps had not provided site-specific data showing that the Wetlands have more than a speculative or insubstantial effect on the chemical, physical, or biological integrity of the Red River.

Regarding the chemical connection, Plaintiffs argued that the Initial JD provided no measurable or quantitative data on how the Wetlands would affect the chemical integrity of the

Red River. AR 654. Rather, the Initial JD talked only in generalities about the functions of headwater streams and wetlands and their importance for nutrient transformation. Id.

As to the physical connection, Plaintiffs contended that any connection was insignificant because there was little to no flow from the Wetlands to the Red River. AR 656. Additionally, Plaintiffs argued that the Wetlands considerable distance from the Red River caused any connection between them to be speculative and insubstantial at best. AR 478.

With respect to the biological connection, Plaintiffs argued that the Wetlands provide no fish habitat to support such a connection, the flow in the tributary is too minimal to constitute a significant biological contribution to the Red River, and the Wetlands are ecologically different from the Middle River biome because they are a rich fen, whereas the Middle River is a bottomland forest. AR 659.

**E. Appeal Decision**

On October 24, 2012, the Corps issued an Administrative Appeal Decision (Appeal Decision), concluding that the Administrative Record lacked sufficient documentation to support a finding that the Wetlands have a significant nexus that is more than insubstantial or speculative on the chemical, physical, and biological integrity of the Red River. AR 648, 660. The Appeal Decision stated that the Initial JD spoke only to the overall functions provided by stream headwaters and wetlands in general, and did not speak to how the functions that the specific onsite wetland and tributaries have a significant nexus that is more than speculative or insubstantial on the chemical, physical, or biological integrity of the downstream [traditional navigable water]. AR 660. For each of these attributes chemical, physical, and biological the Appeal Decision identified the reasons that the Administrative Record was

deficient and the actions needed to complete the record.

**1. Chemical Connection**

**a. Deficiencies**

The Appeal Decision noted that the Initial JD's description of the tributary's chemical properties includes statements that "[s]urface flows were not observed in the tributary by the Corps staff," that "[w]ater quality has not been formally assessed," and that "there is no water quality data for the unnamed tributary." AR at 654–55. The Appeal Decision concluded there is no significant chemical connection to the Red River because:

> the [Administrative Record] does not contain data supporting flow regime, volume, duration, or frequency from the wetlands to the river. Additionally, the District states that indicators of the transport of energy, materials, and nutrients were observed during a site visit, but there is no quantitative dat[a] given to support the finding.
>
> The District's use of the word "suggest", and "reasonable to conclude" in their descriptions of ground water influence on tributary flow implies speculation. There were no specific facts documented that could verify these assertions.

AR 655 (footnote omitted).

**b. Required Action**

The Appeal Decision instructed that upon remand, the District shall "provide sufficient documentation of a significant nexus on the wetlands, including an analysis of whether the wetlands have more than a speculative or insubstantial effect on the chemical integrity of . . . the Red River of the North." Id. at 654. The District was specifically required to "document the volume, duration, and frequency of water flow from the wetlands to the [Red River]." Id.

**2. Physical Connection**

**a. Deficiencies**

As with the chemical connection, the Review Officer noted the lack of data from site observations establishing a physical connection between the Wetlands and the Red River:

> While the [Administrative Record] provides information indicating an [ordinary high water] mark for the unnamed tributary exists, it does not provide sufficient evidence to establish a significant nexus that the number of flow events, volume, duration, and frequency of water flowing through the tributary are such that it has an appreciable effect on the [traditional navigable water]. The District stated that flow was present during the site visit; however, the District could not definitively identify any type of flow present in the channel by either precipitation runoff or by groundwater flow. Additionally, the District stated that additional site investigations would be needed to determine the site's hydrologic connectivity.

AR 658 (footnote omitted).

**b. Required Action**

The Appeal Decision stated that upon remand, "the District will document the number of flow events per year, volume, duration, and frequency of flow events from the wetlands to the [traditional navigable water]." AR 656.

**3. Biological Connection**

**a. Deficiencies**

In concluding that the Administrative Record failed to adequately support a biological connection between the wetlands and the Red River, the Appeal Decision again noted that "field assessments did not provide evidence of water flow." AR at 659. Further, "[a]dditional information is needed to indicate if the wetland provides any significant biological/ecological contribution to the [traditional navigable water]." Id.

**b. Required Action**

The District was required upon remand to "provide additional documentation of a significant nexus on [sic] the wetlands, including an analysis of whether the wetlands have more than a speculative or insubstantial effect on the biological integrity of the nearest traditional navigable water." AR 658. Specifically, the District was required to "document the hydrologic, ecologic, and other functions performed by the tributary and all of its adjacent wetlands." Id.

**F. Revised Jurisdictional Determination**

Following the Appeal Decision, the District consulted with a Life Scientist/Enforcement Officer from the Environmental Protection Agency ("EPA") regarding the decision. AR 718. The EPA Officer opined that "the [Review] Officer's main point is that while the [Corps'] record has some nice generalities about headwater streams and wetlands, [because] there is little or no evidence characterizing the ditch or [unnamed tributary] 'flows', he can't say the functions matter to, connect to, or affect the [traditional navigable water] . . . . Seems [the Corps] must monitor flow like we and they have done on other matters." Id. The Corps then planned to make an additional visit to the site to buttress its remand response, but was unable to do so due to weather. AR 723–24.

On December 31, 2012, the District issued a Revised Jurisdiction Determination ("Revised JD") in which it again concluded that a significant nexus exists to support CWA jurisdiction. No additional site evaluations were performed to reach the conclusion in the Revised JD, and no new site-specific data was added to the Administrative Record that had not already been before the Review Officer at the time of the Appeal Decision. In response to the Appeal Decision's requirement that the Corps document the "volume, duration, and frequency"

of water flow "from the wetlands to the [traditional navigable water]," AR 654, 656, the District calculated a hypothetical range of the volume and duration of flow in the tributary by estimating the size of the tributary's cross sectional area and multiplying this figure by an assumed range of average velocities. AR 792. The Revised JD did not include any documentation or data – hypothetical or otherwise – regarding the flow of water through the 512-foot ditch that connects the Wetland Complex to the tributary.

Among the differences between the Initial JD and the Revised JD, the language in the Initial JD that the Review Officer had characterized as speculative was excised from the Revised JD and was replaced with more definitive wording. For example, the Initial JD stated that "pools in channel in December suggest groundwater discharge into the tributary but this contribution has not been confirmed," AR 428, and that "additional site investigations would be required to confirm [the groundwater] contribution." AR 427 (emphases added). This text was deleted from the Revised JD, which in revised form stated that the Corps made "direct observations of groundwater supported pools in the stream channel." AR 792 n.3 (emphases added). Similarly, the Initial JD stated: "Although not verified, surface flows are believed to occur in response to snowmelt and precipitation and would most likely be present between March and June and after significant precipitation events in other portions of the growing season." AR 429 (emphases added). This sentence was altered in the Revised JD to read: "Surface flows occur in response to snowmelt and precipitation with continuous discharges present between March and June and more intermittent discharges occurring after significant precipitation events in other portions of the year." AR 785 (emphasis added).

The Revised JD concluded that "a significant nexus exists between [the] relevant reach

(comprised of the tributary and its adjacent wetlands) and the Red River of the North, a traditionally navigable water. AR 796.

**G. Procedural History**

On January 11, 2013, Plaintiffs filed this action under the APA, seeking judicial review of the Revised JD. See Compl. [Docket No. 1]. The Corps moved to dismiss the Complaint and this Court granted the motion, holding that the Revised JD was not final under the APA. Hawkes Co., Inc. v. U.S. Army Corps of Engrs, 963 F. Supp. 2d 868 (D. Minn. 2013). The Eighth Circuit reversed, holding that the Revised JD is a final appealable determination. Hawkes Co.,Inc. v. U.S. Army Corps of Engrs, 782 F.3d 994 (8th Cir. 2015). The Supreme Court granted certiorari, affirmed the Eighth Circuit's holding, and remanded the case to this Court for further proceedings. U.S. Army Corps of Engrs v. Hawkes Co., Inc., 136 S.Ct. 1807 (2016).

**H. Present Motions**

The parties have now filed cross motions for summary judgment. Plaintiffs argue the Revised JD is arbitrary and capricious because it is based on the same administrative record that the Corps own Review Officer has previously found to be insufficient for supporting jurisdiction under the CWA. According to Plaintiffs, the Corps did not undertake any further site investigation or provide any new data to support the conclusion in the Revised JD. Rather, the Corps simply used different words to describe the same evidence and reach the same conclusion that the Appeal Decision found to be erroneous. Plaintiffs further argue that if the Court determines that the Revised JD is arbitrary and capricious, remand is not appropriate because the Corps should not be entitled to yet another bite at the proverbial apple in attempting to provide evidence to support its assertion of CWA jurisdiction. Plaintiffs thus ask the Court to

reverse the Revised JD and enjoin the Corps from asserting jurisdiction over the Wetlands.

The Corps argues that the Appeal Decision did not require it to conduct additional field investigations or collect new data. Rather, the Corps was entitled to rely on available hydrologic information such as the tributary's physical characteristics, predicted discharge rates in the tributary, and the Corps' seasonal stream evaluation protocol to make the significant nexus finding. The Corps also contends that if the Court determines that the Revised JD is arbitrary and capricious, the proper course of action is to remand the matter to the agency to address whatever infirmities the Court finds.

## III. DISCUSSION

### A. Summary Judgment Standard

Federal Rule of Civil Procedure 56 provides that summary judgment shall issue "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). On a motion for summary judgment, the Court views the evidence in the light most favorable to the nonmoving party and draws all justifiable inferences in its favor. Ludwig v. Anderson, 54 F.3d 465, 470 (8th Cir. 1995). The nonmoving party may not "rest on mere allegations or denials but must demonstrate on the record the existence of specific facts which create a genuine issue for trial." Krenik v. Cty. of Le Sueur, 47 F.3d 953, 957 (8th Cir. 1995) (internal quotation omitted).

### B. Standard of Review of Agency Actions

The APA provides that an agency action may be set aside if it is "arbitrary, capricious, an

abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. 706(2)(A). The district court must perform a searching and careful review of the administrative record to determine whether the agency s decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Downer v. U.S. By Through U.S. Dep t of Agric. Soil Conservation Serv., 97 F.3d 999, 1002 (8th Cir. 1996) (quoting Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989)). The arbitrary and capricious standard of review is a narrow one, and [t]he court is not empowered to substitute its judgment for that of the agency. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). The standard requires courts to give agency decisions a high degree of deference, particularly when the issue is within an agency s area of expertise. Voyageurs Nat l Park Ass n v. Norton, 381 F.3d 759, 763 (8th Cir. 2004).

**C. Analysis**

The Corps argues that the Revised JD includes significant new information and analysis that adequately addresses the deficiencies identified in the Appeal Decision, and that although only one of the three attributes physical, chemical, or biological is needed to show a significant nexus between the Wetland Complex and the Red River, the Revised JD has documented that all three exist.

**1. Physical Connection**

The Appeal Decision concluded that the Administrative Record did not establish a significant physical nexus because among other things: (1) it d[id] not provide sufficient evidence to establish a significant nexus that the number of flow events, volume, duration, and frequency of water flowing through the tributary are such that it has an appreciable effect on the

[traditional navigable water]; AR 658, (2) the District could not definitively identify any type of flow present in the channel by either precipitation runoff or by groundwater flow; id., and (3) the District stated that additional site investigations would be needed to determine the site's hydrologic connectivity. Id.

**a. Flow**

The Corps argues that additional site-specific documentation of flow in the tributary was included in the Revised JD to support the physical (and chemical) connection between the Wetlands and the Red River. Specifically, the Revised JD calculated a hypothetical range of discharge rates for the tributary (i.e., amount of water moving through the tributary) by estimating the tributary's cross sectional area and multiplying the estimated area by an assumed range of velocities. AR 792. Based on this hypothetical range of discharge rates, the Revised JD characterized the tributary as having continuous flows in the spring in response to snowmelt and precipitation. Id. The Revised JD also described the Corps' seasonal stream evaluation protocol in more detail. The Corps argues that the stream evaluation protocol was not discussed or relied upon in the Appeal Decision, and that this protocol constitutes available hydrologic information that the Corps may use to characterize the tributary's flow.

These additions to the Appellate Record do not alter the conclusions reached in the Appeal Decision. The hypothetical discharge calculations are based on assumed variables, and thus do not remedy the lack of sufficient "evidence" regarding the number of flow events, volume, duration, and frequency in the tributary. AR 658. Nor do the calculations overcome the District's failure to "definitively identify any type of flow present" in the tributary by either precipitation runoff or groundwater flow. Id.

Addressing the seasonal stream evaluation protocol, the Administrative Record shows that the Appeal Officer specifically considered the protocol and discussed it in the Appeal Decision. Prior to issuing the Appeal Decision, the Review Officer requested additional information regarding the protocol. AR 629. The District responded by providing literature on the seasonal stream evaluation protocol and explaining: "We readily acknowledge that this is a tool that we use and is not a definitive indicator of the flow regime of the tributary but in cases where we do not have the luxury of monitoring flow we use it to help us with these determinations." AR 629, 632–43. The Appeal Decision quotes the Initial JD's discussion of the seasonal stream evaluation protocol, including the Initial JD's assertion that the unnamed tributary's drainage area is "almost 2.5 times the threshold identified during the District's assessment of flow duration on first and second order tributaries." AR 657 (quoting Initial JD at AR 427). Thus, the Review Officer was well aware that the tributary dimensions easily satisfied the Corps' stream evaluation protocol. Even with that knowledge, the Review Officer determined that the Administrative Record "does not provide sufficient evidence to establish a significant nexus that the number of flow events, volume, duration, and frequency of water flowing through the tributary are such that it has an appreciable effect on the [traditional navigable water]." AR 658.

The Corps also argues that the Revised JD included an updated characterization of the flow in the unnamed tributary based on average snowfall for the area and indicators of flow observed on-site in the tributary, such as an ordinary high water mark. None of this information is new to the Revised JD. The Initial JD included the same average snowfall measurements as the Revised JD, and also noted the existence of an ordinary high water mark in the tributary. See

AR 426 (snowfall amounts in Initial JD); AR 428 (ordinary high water mark in Initial JD). These items were referenced the Appeal Decision, which shows they were considered by the Review Officer. See AR 656 ("The [Administrative Record] included documentation regarding precipitation amounts [and] snowfall amounts . . . ."); AR 658 (stating "the [Administrative Record] provides information indicating an [ordinary high water] mark for the unnamed tributary exists"). Thus, the average snowfall amounts and indicators of flow in the tributary do not constitute newly evaluated information or documentation that would change the outcome of the Appeal Decision.

The Corps further asserts that although the Initial JD included speculative language about whether the tributary is supported by groundwater, the Revised JD includes new information that enables the Corps to determine that groundwater does contribute to the tributary's assumed flow. The Initial JD stated that the observations of pools throughout the tributary in the midst of a severe drought "suggest[ed] that there is a groundwater component to the flow in the channel," but that "additional site investigations would be required to confirm this contribution." AR 427. The Revised JD, in addition to noting the severe drought, also stated that "no precipitation was recorded during the three days leading up to the site investigation." AR 782. The Corps contends that the existence of the pooled water despite a severe drought and no precipitation in the preceding three days enabled the Corps to determine that groundwater contributes to the tributary. However, the pools were "iced over" at the time they were observed in December 2011. AR 242; see also AR 255–56 (photographs of frozen pools). Thus, it is not surprising that the pools persisted in the channel despite the lack of precipitation in the preceding three days. The added fact about the lack of recent precipitation does nothing to confirm that

groundwater contributes to the tributary.

In addition to the uncured deficiencies regarding flow analysis for the tributary, the Revised JD provides no documentation or analysis to establish the existence or extent of the flow of water through the man-made upland ditch that connects the Wetlands to the tributary.[5] Documentation and analysis of water flow in the ditch is critical because the ditch "provides a discrete hydrologic connection from the wetland to the Red River" and establishes the Wetland Complex's adjacency to the Red River. AR 651 ("While the man-made ditch along the southern border of the wetland is not jurisdictional, it provides a discrete hydrologic connection from the wetland to the Red River. Using a non-jurisdictional ditch to establish adjacency to a [traditional navigable water] is supported by the Revised 2008 Guidance . . . ."). Because such documentation and analysis is lacking for the ditch, the Revised JD does not satisfy the Appeal Decision's requirement that the Corps document the volume, duration, and frequency of water flow from the Wetlands to the Red River. The Review Officer determined that this documentation is necessary to establish that the Wetlands have a physical nexus to the Red River that is more than speculative or insubstantial.

**b. Flood Water Storage**

The Corps also argues that the physical connection between the Wetland Complex and the Red River is established by additional documentation in the Revised JD showing the significant water storage function the Wetland Complex provides for the Red River. The Revised JD includes information about the frequency of flood events on the Red River from

[5] As noted earlier, the ditch does not have a continuous ordinary high water mark, and it is unclear whether flattened vegetation in the ditch bottom is primarily due to water flow or wildlife use. AR 250.

2001 to 2010 and explains that the Red River Water Management Board, Red River Basin Flood Damage Working Group, and other institutions have determined that flood water storage in the watershed's upstream wetlands is an important strategy in reducing flooding along the Red River. AR 794. The District calculated a storage potential of 200 acre-feet for the wetlands in the review area and determined that maximum storage would occur during the peak spring flooding season. AR 795.

This information is not new to the Revised JD. The same points were made in the Initial JD which, like the Revised JD, listed the frequency of Red River flood events from 2001 to 2010, noted the flatness of the Red River basin, explained that water storage in the watershed's upstream wetlands is recognized as an important factor in reducing spring runoff and downstream flooding, and estimated that the Wetland Complex is capable of providing over 200 acre-feet of water storage. AR 435. Thus, the supposedly additional information that the Corps relies on is essentially the same information that the Review Officer found insufficient to support a significant nexus.

**2. Chemical Connection**

**a. Flow**

Similar to the physical connection, the Review Officer's determination that a significant chemical connection had not been shown was based on the absence of site-specific facts and data to support a chemical connection from the Wetlands to the Red River. For example, "[s]urface flows were not observed in the tributary by Corps staff," AR 654, there was "no water quality data for the unnamed tributary," AR 655, and there were "no specific facts documented that could verify" the Initial JD's assertion that ground water contributed to flow in the tributary. Id.

For the same reasons as those discussed for the physical connection, the Administrative Record underlying the Revised JD does not alter the determination in the Appeal Decision that the Corps failed to provide sufficient site-specific data and facts regarding the frequency, volume, and type of flow between the Wetlands and the Red River to establish a significant chemical nexus.

**b. Turbidity, Pollution**

The Corps further argues that the Revised JD establishes the significance of the chemical connection by further documenting the chemical functions served by the tributary and wetlands. For example, the Revised JD explains that the Red River is listed as impaired for turbidity by the Minnesota Pollution Control Agency, and the Wetland Complex provides a "sink" that traps chemicals, pollutants, nutrients, mercury, and sediment and prevents them from being released downstream. See AR 796.

Again, this information is not new, as the same points were made in the Initial JD. See AR 435 ("The wetlands in the relevant reach also trap sediments and transform and store pollutants and nutrients, which is important for downstream water quality."); AR 437 ("The Red River is listed as impaired for aquatic life and aquatic consumption . . . . The pollutants/stressors for these impairments are mercury and PCB in fish tissue and turbidity."). The Review Officer has already determined that this generalized information regarding the functions of wetlands in the review area is not sufficient to support a significant chemical nexus with the Red River.

**3. Biological Connection**

The Appeal Decision also concluded that the Administrative Record did not establish a significant biological connection between the Wetlands and the Red River because "field assessments did not provide evidence of water flow" and because there was "no mention [in the

Initial JD] of species being located within the tributary or wetland." AR 659.

The Corps argues that the Revised JD provides additional information to establish a biological connection. For example, in response to the finding in the Appeal Decision that the "District . . . did not indicate if the expansion area wetland supports any aquatic/wildlife diversity," the Revised JD states that "[t]he tributary could serve as a movement corridor between the Middle River and the wetland and upland habitats adjacent to it. Amphibians, reptiles, and mammals all utilize stream channels as migration routes and various species of each are known to inhabit this portion of Minnesota." AR 784. However, the possibility that the tributary "could" serve as a movement corridor is speculative and is based on general information of the function of stream channels, rather than site-specific information. As the Appeal Decision recognized, information regarding "the overall functions provided by stream headwaters, the similarly situated wetlands, and wetlands in general, within the review area" does not speak to "how the functions that the specific onsite wetland and tributaries have a significant nexus that is more than speculative or insubstantial on the chemical, physical, or biological integrity of the downstream [traditional navigable water]." AR 660 (emphases added).

The Corps also contends that the Revised JD further documents the tributary's functions of providing nutrients and energy to the Red River and transforming nutrients by breaking down and transporting organic matter such as leaf litter and woody debris into forms more readily available to biota in downstream waters. See AR 796 (discussing tributary's nutrient transportation and transformation functions). Again, this information was included in the Initial JD but was not sufficient to establish a significant biological connection between the Wetlands

and the Red River. See AR 437 (describing headwater streams' role in breaking down and transporting organic matter to support food webs downstream). As with the Initial JD, the Revised JD notes the existence of leaf litter and woody debris in the tributary, but includes no quantitative data to support the finding that the tributary transports nutrients from the Wetlands to downstream waters. See AR 655 ("Additionally, the District states that indicators of the transport of energy, materials, and nutrients were observed during a site visit, but there is no quantitative dat[a] given to support the finding."). Moreover, the added documentation does nothing to address the Appeal Decision's finding that "field assessments did not provide evidence of water flow." AR 659.

In sum, the Revised JD is based on essentially the same information and documentation that was already determined by the Review Officer to be insufficient for establishing more than a speculative or insubstantial nexus between the Wetlands and the Red River. To the extent that the Revised JD includes additional information, the added information fails to remedy the deficiencies in the Initial JD that were identified by the Review Officer, including that: "[s]urface flows were not observed in the tributary by the Corps staff," AR 654, "there is no water quality data for the unnamed tributary," AR 655, "field assessments did not provide evidence of water flow," AR 659, "the District could not definitively identify any type of flow present in the channel by either precipitation runoff or by groundwater flow," AR 658, and "additional site investigations would be needed to determine the site's hydrologic connectivity." Id. Because the Revised JD relies on the same factual record that the Appeal Decision has already found to be insufficient for CWA jurisdiction, the conclusion in the Revised JD that a significant physical, chemical, or biological nexus exists between the Wetlands and the Red

River is arbitrary and capricious.

**D. Deference to Agency Expertise**

In concluding that the Revised JD is arbitrary and capricious, the Court is not substituting its own judgment for the agency's expertise. See Voyageurs Nat'l Park Ass'n, 381 F.3d at 763 (stating review under the APA requires courts to give agency decisions a "high degree of deference," particularly when the issue is within an agency's area of expertise). The agency's own Appellate Review Officer determined in his expert opinion that the administrative record underlying the Initial JD lacked sufficient site-specific data and evidence to support a finding that the Wetlands have a significant chemical, physical, or biological nexus to the Red River. Because the District failed to supplement the administrative record with additional site-specific evidence and information that the Review Officer found to be necessary, the conclusion in the Revised JD that CWA jurisdiction exists is arbitrary and capricious.

**E. Remedy**

Having concluded that the Revised JD is arbitrary and capricious and must be set aside, the Court must next determine the proper course of action to resolve this case. Plaintiffs argue that the appropriate relief is an injunction that enjoins the Corps from asserting jurisdiction over the Wetlands. The Corps disagrees, arguing the proper remedy is a remand to the Corps to address the infirmities found by the Court. The Corps contends that it would be plainly erroneous for the Court to conclude that there are no circumstances and no facts under which the Corps could establish regulatory jurisdiction, and thus Plaintiffs are not entitled to the injunctive relief they seek.

If an agency decision is not supported by the administrative record, the general rule is

that the matter should be remanded to the agency for additional investigation or explanation. See Ramirez-Peyro v. Gonzales, 477 F.3d 637, 641 (8th Cir. 2007) ("Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands.") (quoting INS v. Orlando Ventura, 537 U.S. 12, 16 (2002) (per curiam)); Fl. Power & Light Co. v. Lorion, 470 U.S. 727, 744 (1985) ("If the record before the agency does not support the agency action . . . the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."). This rule, however, is not without exceptions. See Fl. Power, 470 U.S. at 744 (stating that remand is the proper course "except in rare circumstances"). For example, courts have declined to remand matters to an agency for "a second bite of the apple just because [the agency] made a poor decision," particularly where remand would make administrative law "a never ending loop from which aggrieved parties would never receive justice." McElmurray v. U.S. Dep't of Agric., 535 F. Supp. 2d 1318, 1336 (S.D. Ga. 2008) (quoting McDonnell Douglas Corp. v. NASA, 895 F. Supp. 316, 319 (D.C. 1995)).

Here, the Corps already had two opportunities to establish a significant chemical, physical, or biological nexus between the Wetlands and the Red River. After falling short in the Initial JD, the Corps was given a chance to supplement the Administrative Record with additional site-specific evidence and information to support its significant nexus determination. It did not do so. Allowing the Corps a third bite at the apple would force Plaintiffs back through a "never ending loop."

The Corps has been aware of Hawkes' desire to mine peat from the Wetlands since at least 2007, and has had years to collect site-specific information regarding CWA jurisdiction.

AR 59□61. In 2007, Hawkes told the Corps that the peat it was currently mining would be depleted in approximately ten years, and that expanding its operations to the Wetlands was necessary to extend the life expectancy of its mining operations. AR 61, 74. This 10-year period has nearly elapsed, and yet the Corps asks this Court to remand the matter back to it for yet another chance to establish CWA jurisdiction.

Remand under these circumstances would fuel what the Eighth Circuit characterized as the Corps□□transparently obvious litigation strategy□□ leaving Plaintiffs without an adequate remedy until □the Corps . . . achieve[s] the result its local officers desire, abandonment of the peat mining project□□ without ever having to establish CWA jurisdiction. Hawkes, 782 F.3d at 1001. As the Eighth Circuit noted, □the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case . . . leaves most property owners with little practical alternative but to dance to the EPA□s [or to the Corps□] tune.□ Id. at 1002 (quoting Sackett v. EPA, 132 S.Ct. 1367, 1375 (2012) (Alito, J., concurring) (internal quotation marks omitted)). Plaintiffs should not have to continue to wait to mine their land while the Corps engages in a third effort to establish regulatory jurisdiction over the Wetlands.

Accordingly, the proper remedy here is to set aside the Revised JD as arbitrary and capricious, and to enjoin the Corps from asserting jurisdiction over the Wetlands. This conclusion is not reached lightly, as the Court is aware that peat mining can have significant impacts on the environment. However, peat mining and processing is regulated in Minnesota through permits issued by the Minnesota Department of Natural Resources, thereby ensuring that Plaintiffs□peat mining operations will not go unregulated or unchecked. See, e.g., Minn. Stat. □

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## IV. CONCLUSION

Based on the foregoing, and all the files, records and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Plaintiffs Hawkes Co., Inc., Pierce Investment Co., and LPF Properties, LLC's Motion for Summary Judgment [Docket No. 49] is **GRANTED**;

2. Defendant United States Army Corps of Engineers' Cross Motion for Summary Judgment [Docket No. 79] is **DENIED**;

3. The Corps' Revised JD is unlawful and is set aside as arbitrary, capricious, and an abuse of discretion; and

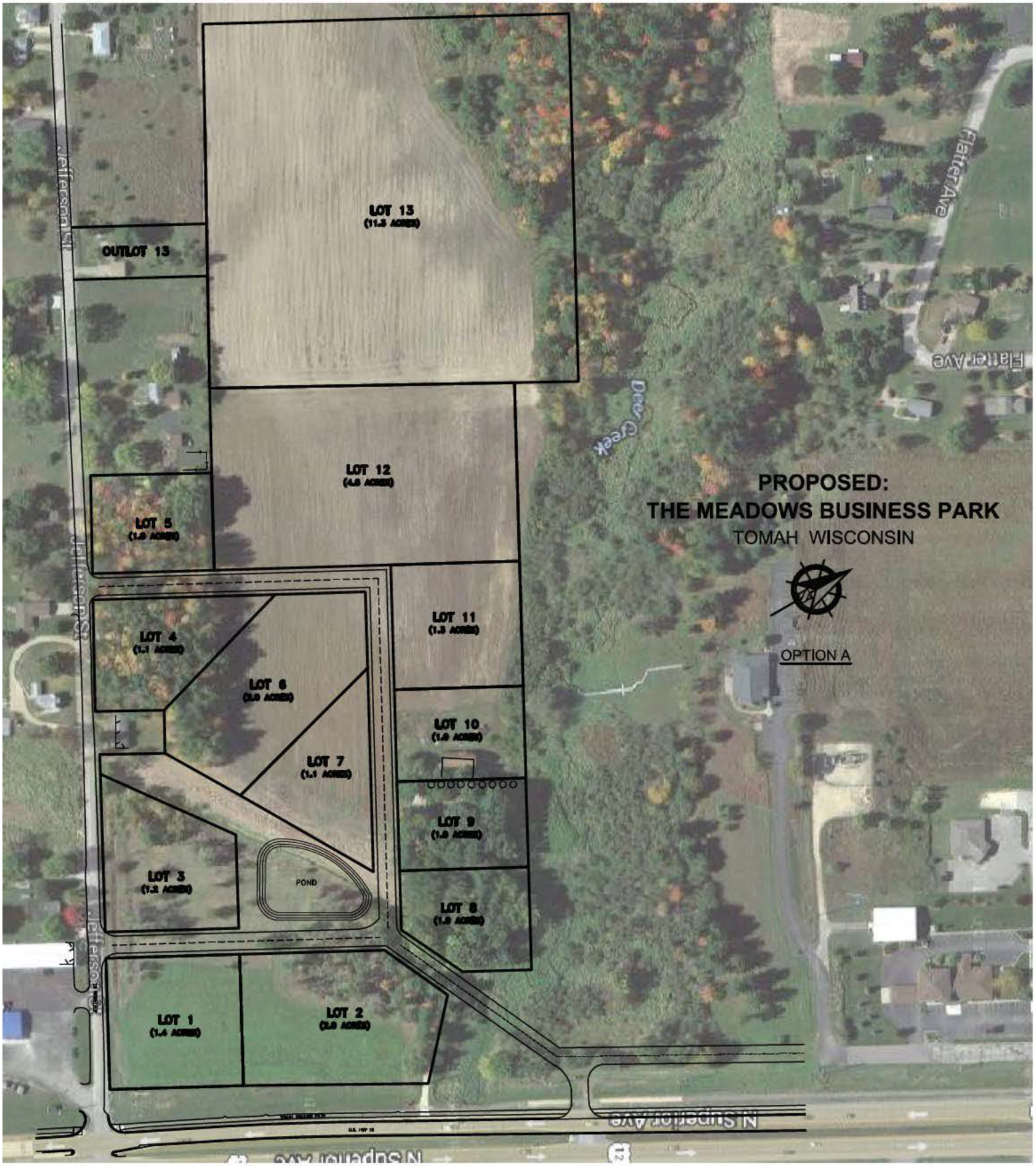
4. Defendant United States Army Corps of Engineers is enjoined from exercising jurisdiction under the Clean Water Act, 33 U.S.C. § 1251, et seq., over the Wetlands.

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

BY THE COURT:

s/Ann D. Montgomery
ANN D. MONTGOMERY
U.S. DISTRICT JUDGE

Dated: January 24, 2017.


LOT 13
(11.5 ACRES)
OUTLOT 13
LOT 12
(4.8 ACRES)
LOT 5
(1.9 ACRES)
LOT 4
(1.1 ACRES)
LOT 6
(2.0 ACRES)
LOT 7
(1.1 ACRES)
LOT 11
(1.3 ACRES)
LOT 10
(1.0 ACRES)
LOT 9
(1.0 ACRES)
LOT 8
(1.0 ACRES)
POND
LOT 3
(1.2 ACRES)
LOT 1
(1.4 ACRES)
LOT 2
(2.0 ACRES)
Jefferson St
Flatter Ave
Deer Creek
N Superior Ave
PROPOSED:
THE MEADOWS BUSINESS PARK
TOMAH WISCONSIN
OPTION A

Feb.21,2017

Good Morning Major General Wehr & Col. Calkins,

**M.G. Wehr and staff,**

Thank you for the meeting of February 3, 2017 in your Vicksburg office. We appreciate you and your staff's time, patience and consideration of our nearly two hour discussion. As know, Kelly Bopray, Kevin Pierce of Hawkes Company's and myself outlined examples of our Frustrations and Capricious treatment by veteran & senior corps officials of the St Paul District. I'm glad you and you staff have reviewed the recent vindication, of the (Hawkes decision)13-cv-00107-ADM-TNL doc 85 (1/24/17)
As I said it speaks for itself (especially pg. 26) of the decision. I'm sorry you missed Mr. Pierce's comments. I hope Mr. Bodron briefed you on the balance of the discussions and Mr. Pierce's concerns.

**Col. Calkins,**

Thank you for text and e-mail, in response to our inquiry.
Today marks the **601st day** in our quest, to get a Fair and Equitable response to the "Meadows Business Parks' AJD request. We are still very troubled on how the St. Paul District can submit a package, for referral or confirmation to the EPA or COE. When the July 2016 site data sheets, are still filled with falsified information and unsubstantiated data from the 2016 site visit.(as responded to Jeff Olson by e-mail on 12/16/16). Your own (Jeff Olson) agreed in our Nov. meeting in your office. The 2003 references or data was inappropriate! Then Kelly Bopray asked the same question in our 2/3/17 meeting in Vicksburg." Would the corps accept a delineation he prepared from 2008 or 2010?" The response was NO, there is a 5yr. statue of limitations. **"So why should we accept 2003 data and references" (14 yrs old)** we're not, because it will not hold up in court.
Besides the statue of limitation issue, the 2003 hydrology data was preformed in Apr/May (Pre- WETS table growing season) and only proved 8 days of hydrology (outside the parameters of the "87" manual). The last frost in 2016 was 25 deg. on (May 15, 2016) see attached. And today's standard requires 14 continuous days of the growing season. So you didn't meet the standard then… and in the July 2016 investigation when we had (125-150%) the normal precipitation. No hydrology was present in any of the disputed (25inches) deep pits. Kelly Bopray a (20yr veteran & licensed soil scientist) Charlie Newling & Ray Kagel's who's (record speaks for them self) have rebutted the Jr. Zibung's forced interruptions and unsubstantiated positions.

**Then on top of all that!** How can the COE review, be addressed or confirmed by Ms. Stacy Jensen? The same Stacy Jensen (St. Paul Acting Chief, Regulatory Branch) who ignored us from Jan-May. Then finally responded to our numerous requests on (5-10-16) to Ray Kagel

**She's Bias and that's not a second set of eye's !**

Gentlemen,

Let's get past this, and move on to more important issue's we both should be addressing! Let's admit this crusade by Egger's, Konickson and Adamski is long overdue. I know you have "Big Picture" issues you both need to address. Don't make me go to D.C. and firm up my next appointments with Speaker Ryan and Secretary Pruitt. **Because I will!**

**Let's review:**

You have not and can not prove a surface water connection (14 days of the growing season), because the site is isolated and surrounded by uplands & roads (as required by Rapanos) (2006)

You have yet to demonstrate or prove a significant nexus (Rapanos) 547 U.S. 715, 778-82

(2006) to the Wisconsin River (TNW) 46 miles away. Like (Hawkes) you will need to prove,

"the required nexus must be assessed in the term's of the (CWA) goals and purposes" which are "to restore and maintain the chemical, physical and biological integrity of the nation's waters" and also "When in contrast, wetlands effect on water quality are speculative or insubstantial. They fall outside the zone fairly encompassed by the statutory term navigable waters".

The corps has been given ample opportunity to substantiate your position. On 10/19/16 you chose to conclude any further collection of data. As I said, don't come back with a partial or incomplete response now.

Five (5) highly qualified and respected consultants (**Sander's, Straw, Bopray, Kagel & Newling)** have been to the site, numerous times & disagree with your preliminary positions. Two are original authors or contributors (Sander's & Newling) of the "87" delineation manual. So the gentlemen who wrote the book, disagree with the agents enforcing today's implications.

Even though the Corps, lacks the sufficient evidence to support the exercise of CWA jurisdiction over this specific wetland at issue. We will offer you one last opportunity to approve the Bopray delineation as presented in (June 2015) with the collaborating reports and data of (Bopray, Kagel & Newling) thereafter. There is sufficient evidence to approve the entire site as presented.

Let's not have a second Judge have to characterize this as:

the Corps? ?transparently obvious litigation strategy??leaving Plaintiffs without an adequate remedy until ?the Corps . . . achieve[s] the result its local officers desire, (Hawkes-2016) pg.26

or

Leaves most property owners with little practical alternative but to dance to the EPA?s [or to the Corps?]tune.? Id. at 1002 (quoting Sackett v. EPA, 132 S.Ct. 1367, 1375 (2012) (Alito, J., concurring) **But that was changed with (Hawkes decision)**

or

**Confirm the St. Paul District is once again arbitrary and capricious; in their mission of conducting fair and equitable CWA Jurisdiction interruptions!**

An expedited response and AJD is appreciated.

Pete Thorson

The Meadows Business Park

University of Findlay

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Findlay, OH 45840-3653

1-800-472-9502
www.findlay.edu

Dear Mr. Pruitt,

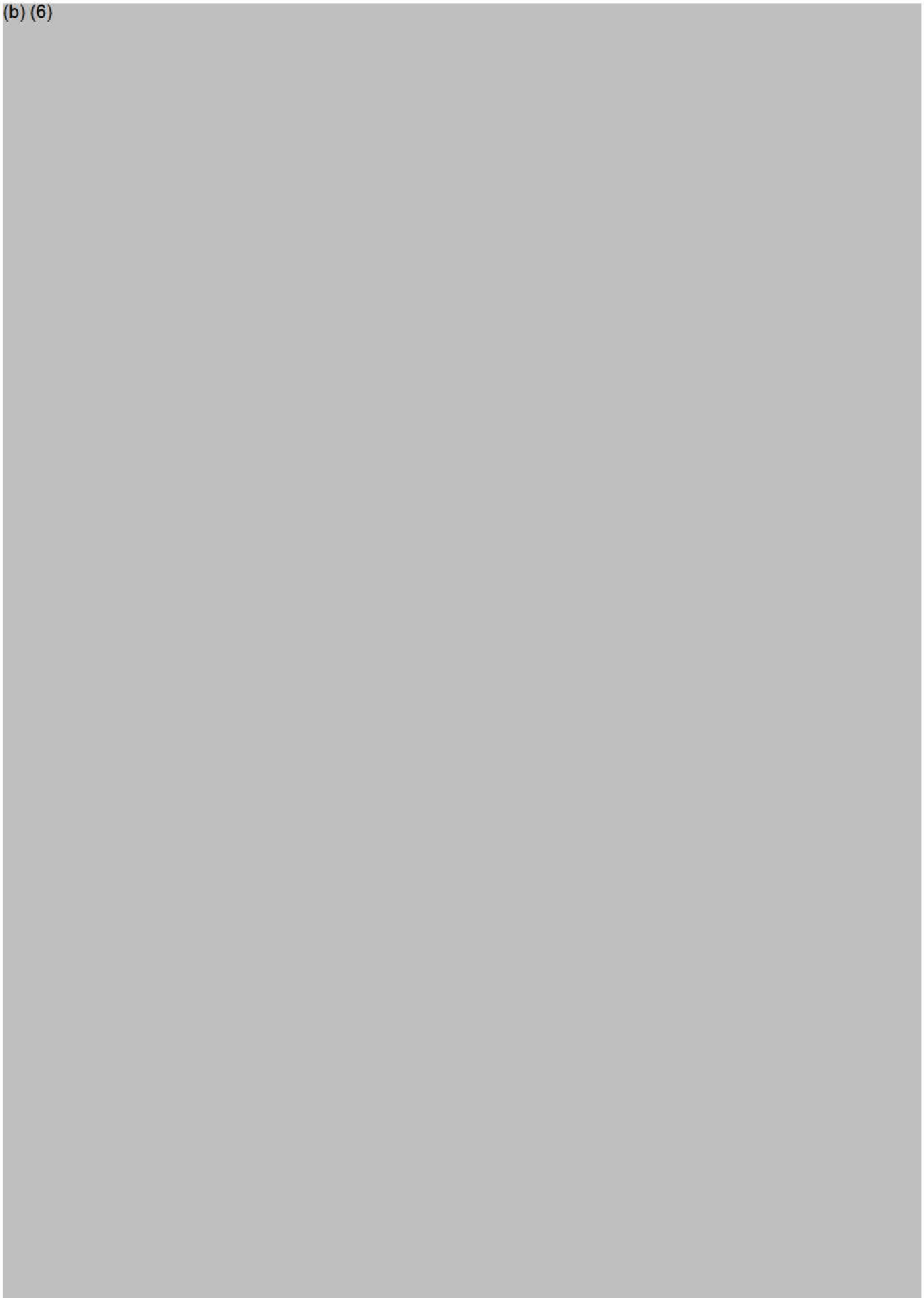
Congratulations on your confirmation! I have long admired your work. I am so very proud to have played a role in President Trump's campaign Ohio as a volunteer and contributor. As a Midwesterner, I am equally proud that our region played such a crucial role in his victory. As President Trump rightly pointed out during the campaign, our country has been hanging by a thread during these last few years. The new administration offers America a chance for renewal and reform unlike anything we have seen before.

I know you and your transition team are very busy, so I will be brief. As a university professor in the Midwest with a (b) (6) I believe that I can be a great asset to you in helping to reform the EPA in a pro-business direction. I have submitted my application via the Trump transition team's online website, but I wanted to go the extra mile by writing to you personally and stressing how honored I would be to have the opportunity to work in this historic administration.

After a successful career in academe and a fulfilling volunteer experience with the Ohio Military Reserve, I am enthusiastic at the possibility of giving back to this great country through service to the country. I could easily coast along in my current comfortable academic job until retirement, but I so very much hope I can be given the chance to make a difference in getting this country on the right path again in so many ways. Above all, I would love to make my son (a sophomore at Hillsdale College) proud to be able to say that his dad served in the historic Trump-Pence administration!

Sincerely,

(b) (6)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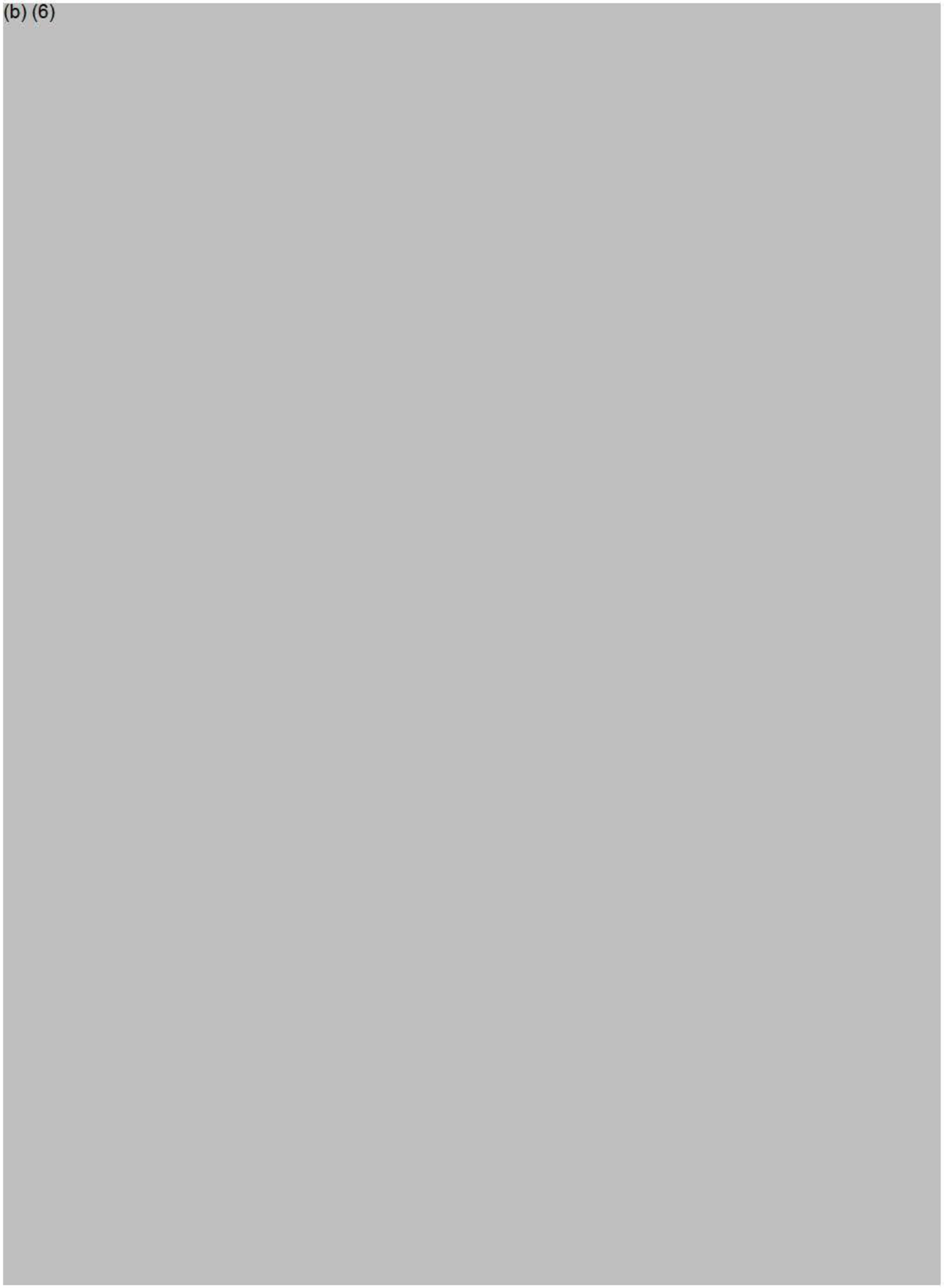
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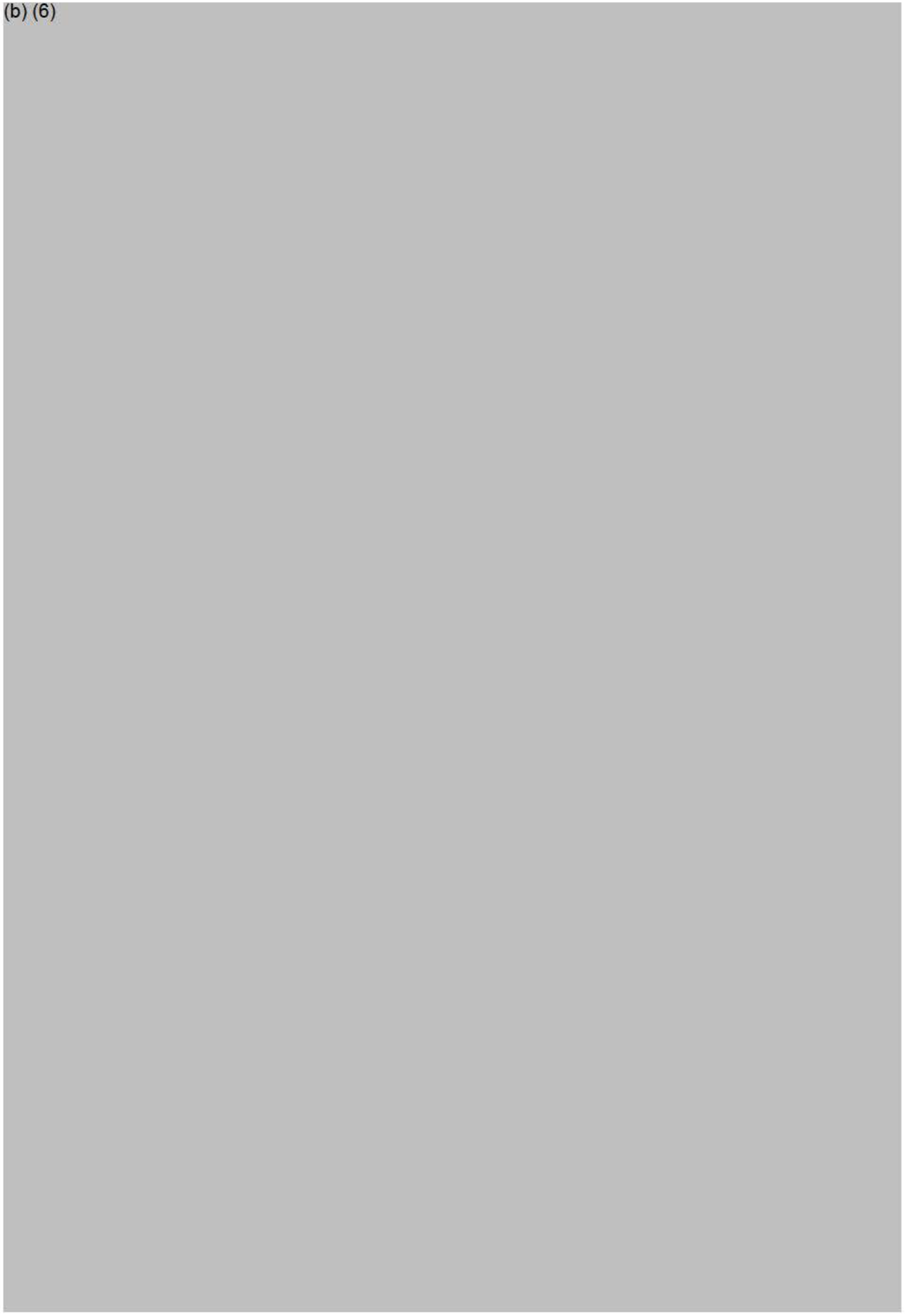
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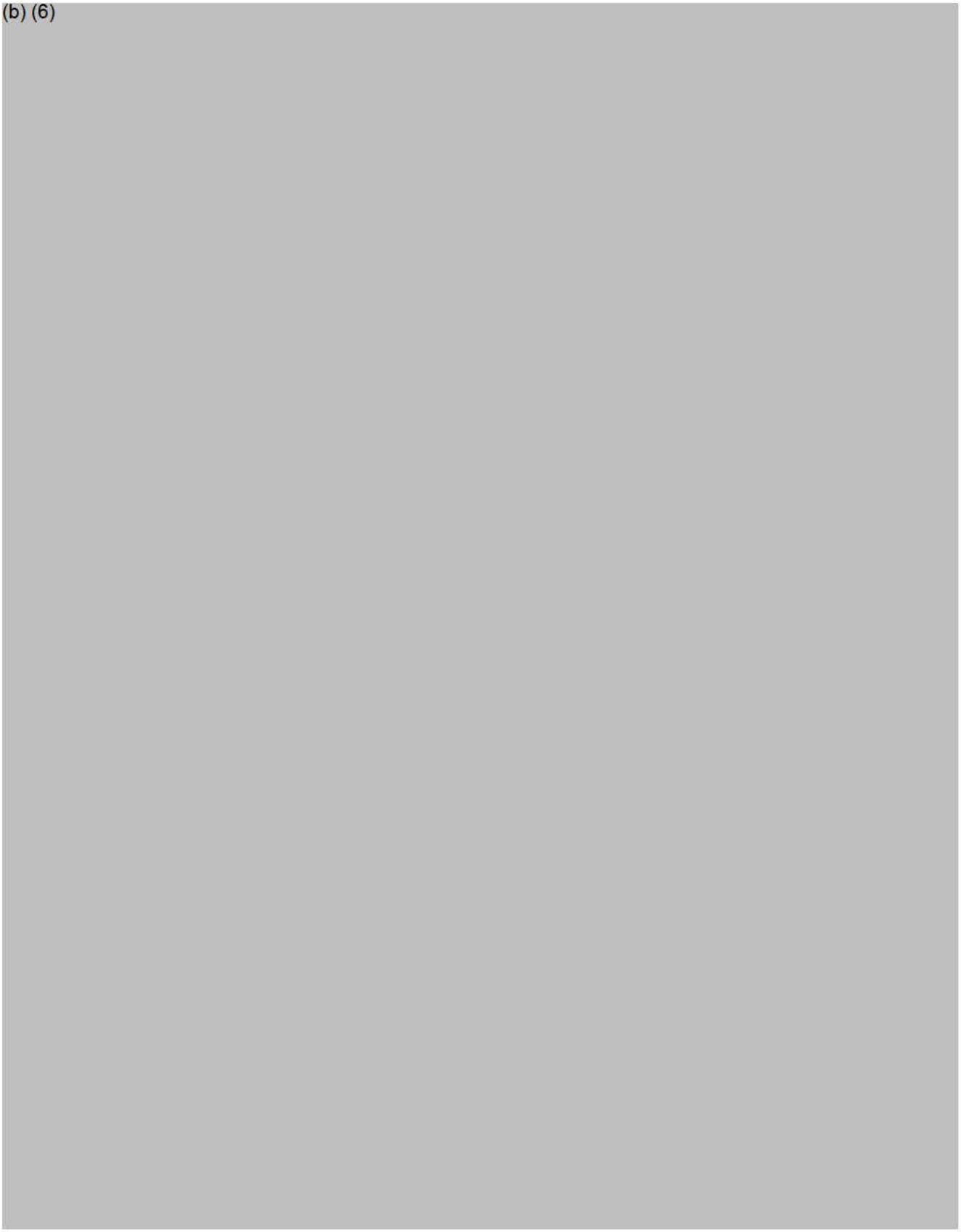
(b) (6)

(6) (6)

FINDLAY
THE UNIVERSITY OF FINDLAY

1000 North Main Street
Findlay, Ohio 45840-3653



Mr. Scott Pruitt

FEB 27 2017

EPA

1200 Pennsylvania Ave., N.W.

Washington, DC 20460

(b) (6)

Energy Secretary Rick Perry
EPA Administrator Scott Pruitt
Interior Secretary Ryan Zinke

Gentlemen:

I expect you will be surveying the damage resulting from ex-President Obama's energy policy, "When I get done regulating coal, utility rates will necessarily skyrocket," the **CAUSE** of the miasma generated by your agencies' overreaching policy responses.

As you reform your bureaucracies, I offer the enclosed **EFFECT** of Obama's energy policy on us here in San Antonio, Texas. The enclosed letter to the Chairman of the CPS Energy Board of Trustees will alert you to the ongoing diversion of public funds to actions that compensate for the diseconomies of subsidized renewable energy (wind and solar). If a subsidy is a government payment to attain a policy objective not economically feasible for the private sector, the subsidized undertaking is, by definition, uneconomic. You can quantify the government subsidies in their many forms devoted to wind and solar production; I cannot.

As a Harvard MBA with extensive private sector experience administering capital expenditure projects, I welcome your examination of our CPS Energy Smart Grid case study which validates the dire allegations contained in the enclosed letter. We are experiencing in San Antonio the compounding effects of NOAA statistical fraud, the emotional reactions of the Green Religion and Obama's ill-advised redistributionist economic philosophy.

Good hunting! We are all so relieved that you are in office. Let me know if our group can help you refine the identified patterns of corruption.

Sincerely yours,

(b) (6)

enclosure
cc. In Texas: Governor Greg Abbott, Senator John Cornyn, Senator Ted Cruz, Representative Lamar Smith